Sanmaru Overseas Marketing Sdn Bhd & Anor v PT Indofood Interna Corp & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02–738 OF 2005, W-02–968 OF 2005 AND W-02–653 OF 2005
GOPAL SRI RAM, JAMES FOONG AND ZULKEFLI JJCA
12 NOVEMBER 2008

Civil Procedure — Parties — Joinder of — Appeal against decision allowing joinder of parties — Whether application should have been refused

Civil Procedure — Stay of proceedings — Application for — Pending appeal against joinder — Whether there were special circumstances justifying stay — Whether appeals rendered nugatory if trial proceeds — Whether appellants estopped from seeking order of stay

The first and second appellants were the second and third defendants in a civil suit filed by the respondents/plaintiffs ('the respondents'). In the civil suit against the appellants the respondents sought, inter alia, an order that the appellants transferred the trademark 'Indomie' to the first respondent. The appellants filed their defence to the claim but thereafter the respondents never filed a summons for directions or set the action down for trial and the pleadings were deemed closed. About nine years after the commencement of the suit the respondents filed an action to substitute PT Indofood Sukses Makmur Tbk ('Sukses Makmur') for the plaintiffs on the grounds that the respondents had been dissolved and liquidated and that Sukses Makmur had taken over the rights and liabilities of the respondents pursuant to a purported merger. The appellants then filed an application to strike out the respondents' action for want of prosecution but this application was dismissed by the deputy registrar ('DR'). The appellants' appeal against the decision of the DR was also dismissed by the judge. The appellants therefore proceeded by way of an appeal against that decision ('the first appeal'). The respondents' application to substitute Sukses Makmur as the plaintiff was allowed by the DR but the appellants appealed against that decision on the grounds that there was insufficient evidence to show that Sukses Makmur had taken over all the rights, obligations, assets and liabilities of the respondents. This appeal was allowed by the judge who then directed that further evidence be adduced to support the application for substitution. No further evidence was adduced by the respondents and Sukses Makmur, but instead the respondents and Sukses Makmur appealed against that decision ('the second

appeal'). At the same time Sukses Makmur had also filed an application to be joined as a plaintiff in the civil suit on substantially the same grounds as the application for substitution referred to earlier. This application was allowed but the appellants appealed against this decision ('the third appeal') by contending that the basis for the application for joinder was not consistent with the admission made by Sukses Makmur that the respondents had been dissolved and liquidated. The appellants had thereafter filed two notices of motion wherein they applied for an order that the civil suit be stayed pending the disposal of its two appeals, ie the first and third appeals. However, at the outset of the hearing of the two applications for a stay, the parties had consented that the three appeals would be treated as appeals proper and heard together.

Held, dismissing the appeals with costs to follow the event of the trial at the High Court:

(1) The civil suit should without further delay go for trial before the High Court. It was critical for both parties that the testimony and evidence of the witnesses be heard immediately since this suit was filed in 1993 and related to incidents which occurred as far back as 1991. Moreover the appellants were estopped from seeking an order to stay the trial by reason of their conduct and participation in pre-trial conferences for case management before this court (see paras 5–6 & 8).

(2) There were no special circumstances justifying a stay of the trial in the High Court as any prejudice that may be suffered by the appellants may be compensated in costs. In any case the appellants had not shown how the first and third appeal may be rendered nugatory if the trial of the action was proceeded with (see para 9).

(3) By reason of the joinder, all parties were now before the court in respect of the civil suit against the appellants and as such the appellants had no basis for complaint or dissatisfaction. The joinder had given an opportunity for all matters in dispute in the civil suit to be effectually and completely determined and adjudicated before the High Court. In addition if the trial was adjourned the appellants would suffer grave prejudice but if the trial were to proceed as scheduled they would suffer no prejudice (see para 10).

[Bahasa Malaysia summary

Perayu-perayu pertama dan kedua adalah defendan-defendan kedua dan ketiga di dalam satu guaman sivil yang difailkan oleh responden-responden/plaintif-plaintif ('responden-responden'). Di dalam guaman sivil terhadap perayu-perayu responden-responden menuntut, antara

lain, satu perintah bahawa perayu-perayu memindahkan tanda dagangan 'Indomie' kepada responden pertama. Perayu-perayu memfailkan pembelaan mereka terhadap tuntutan tersebut tetapi kemudiannya responden-responden tidak memfailkan saman untuk arahan atau menetapkan tindakan untuk perbicaraan dan pliding tersebut disifatkan telah ditutup. Lebih kurang sembilan tahun selepas permulaan guaman tersebut responden-responden memfailkan satu tindakan untuk menggantikan PT Indofood Sukses Makmur Tbk ('Sukses Makmur') sebagai plaintif-plaintif atas alasan bahawa responden-responden telah dibubarkan dan bahawa Sukses Makmur telah mengambilalih hak-hak dan liabiliti-liabiliti responden-responden berikutan satu penggabungan yang dirancang. Perayu-perayu kemudiannya memfailkan satu permohonan untuk membatalkan tindakan responden-responden untuk mendapatkan pendakwaan tetapi permohonan ini telah ditolak oleh timbalan pendaftar ('TP'). Rayuan perayu-perayu terhadap keputusan TP juga telah ditolak oleh hakim. Maka perayu-perayu meneruskan melalui satu rayuan terhadap keputusan tersebut ('rayuan pertama'). Permohonan responden-responden untuk menggantikan Sukses Makmur sebagai plaintif dibenarkan oleh TP tetapi perayu-perayu merayu terhadap keputusan tersebut atas alasan bahawa keterangan tidak mencukupi untuk menunjukkan Sukses Makmur telah mengambilalih kesemua hak-hak, tanggungjawab-tanggungjawab, aset-aset dan liabiliti-liabiliti responden-responden. Rayuan ini telah dibenarkan oleh hakim yang kemudiannya mengarahkan bahawa keterangan selanjutnya dikemukakan untuk menyokong permohonan untuk penukaran tersebut. Tiada keterangan lanjut dikemukakan oleh responden-responden dan Sukses Makmur, tetapi sebaliknya responden-responden dan Sukses Makmur telah juga memfailkan satu permohonan terhadap keputusan tersebut ('rayuan kedua'). Pada masa yang sama Sukses Makmur juga telah memfailkan satu permohonan untuk digabungkan sebagai plaintif di dalam guaman sivil tersebut di atas secara substansial alasan-alasan yang sama dengan permohonan untuk penukaran yang dirujuk sebelum ini. Permohonan ini diterima tetapi perayu-perayu merayu terhadap permohonan ini ('rayuan ketiga') dengan menghujah bahawa asas untuk permohonan bagi percantuman adalah tidak konsisten dengan pengakuan yang dibuat oleh Sukses Makmur bahawa responden-responden telah dibubarkan dan dilikuidasikan. Perayu-perayu kemudiannya telah memfail dua notis tindakan di mana mereka memohon untuk satu perintah bahawa guaman sivil tersebut ditangguhkan sementara menunggu penolakan kedua-dua rayuannya, iaitu rayuan-rayuan pertama dan ketiga. Walau bagaimanapun, di permulaan perbicaraan kedua-dua permohonan untuk penangguhan, pihak-pihak terlibat telah bersetuju bahawa ketiga-tiga rayuan tersebut dianggap sebagai rayuan-rayuan sebenar dan dibicarakan bersama.

Memutuskan, menolak rayuan-rayuan dengan kos mengikut keadaan dalam perbicaraan di Mahkamah Tinggi:

(1) Guaman sivil tersebut sepatutnya, tanpa penangguhan selanjutnya dibawa untuk perbicaraan di hadapan Mahkamah Tinggi. Ia adalah kritikal bagi kedua-dua pihak bahawa testimoni dan keterangan saksi-saksi didengar segera memandangkan guaman ini difail pada tahun 1993 dan berkaitan dengan kejadian-kejadian yang berlaku sejak tahun 1991 lagi. Tambahan pula perayu-perayu diestop dari mendapatkan perintah untuk penangguhan bagi pengurusan kes di hadapan mahkamah ini (lihat perenggan 5–6 & 8).

(2) Tidak terdapat keadaan-keadaan yang istimewa untuk menjustifikasi satu penangguhan perbicaraan tersebut di Mahkamah Tinggi kerana sebarang prejudis yang mungkin dialami oleh perayu-perayu mungkin diberi pampasan kos. Walau bagaimanapun perayu-perayu tidak menunjukkan bagaimana rayuan-rayuan pertama dan ketiga boleh dianggap sia-sia jika perbicaraan terhadap tindakan tersebut diteruskan (lihat perenggan 9).

(3) Dengan sebab percantuman tersebut, semua pihak kini berada di mahkamah berkaitan guaman sivil terhadap perayu-perayu dan oleh itu perayu-perayu tidak mempunyai asas untuk aduan atau tidak puas hati. Percantuman tersebut telah memberi peluang untuk semua hal dalam pertikaian di dalam guaman sivil ditentukan dan diputuskan secara efektif dan menyeluruh di Mahkamah Tinggi. Selanjutnya jika perbicaraan ditangguh perayu-perayu akan mengalami prejudis yang teruk tetapi jika perbicaraan diteruskan seperti yang dijadualkan mereka tidak akan mengalami sebarang prejudis (lihat perenggan 10).]

Notes

For cases on application for stay of proceedings, see 2(1) *Mallals' Digest* (4th Ed, 2007 Reissue) paras 6510–6538.

For cases on joinder of parties, see 2(1) *Mallals' Digest* (4th Ed, 2007 Reissue) paras 5043–5075.

Legislation referred to

Rules of the Court of Appeal 1994
Rules of the High Court 1980 O 56 r 1(3A)

Michael CM Soo (Romesh Abraham and Ong Boo Seng with him) (Shook Lin & Bok) for the appellants.
Tommy Thomas (Chew Kherk Ying and Elaine Yap Chin Gaik with him) (Wong & Partners) for the respondents.

Zulkefli JCA (delivering judgment of the court):

[1] There are two (2) notices of motion filed by the appellants fixed for hearing before us. Essentially, the appellants under the respective notice of motions are applying to this court for an order that the proceedings in the High Court of Kuala Lumpur *Civil Suit No D4–22–1149 of 1993* be stayed pending the disposal of the Court of Appeal, Civil Appeals No W-02–738 of 2005 and W-02–968 of 2005 filed by the appellants. There is also a pending appeal before the Court of Appeal filed by the respondents in Civil Appeal No W-02–653 of 2005.

[2] The first appellant is the second defendant and the second appellant is the third defendant in the *Civil Suit No D4-22–1149 of 1993* filed by the respondents in which the first respondent is the first plaintiff and the second respondent is the second plaintiff. We shall refer the parties as they were in the proceedings before the High Court.

[3] At the outset of the hearing before us, by consent of the parties, the said two notices of motion under Civil Appeal No W-02–738 of 2005 and Civil Appeal No W-02–968 of 2005 were treated as appeal proper and heard together with the pending Civil Appeal No W-02–653 of 2005. The parties also agreed that due compliance with the Rules of the Court of Appeal 1994 relating to appeal be dispensed with.

[4] To have a better understanding of all the matters and issues arising under the said three appeal cases, we would narrate a brief summary of them as follows:

(1) The first and second plaintiffs, commenced the *Civil Suit No D4–22–1149 of 1993* in the Kuala Lumpur High Court ('the said High Court action') on 13 October 1993 against the first, second and third defendants seeking, inter alia, an order that the second and third defendants transfer the trade mark 'Indomie' to the first plaintiff. The second and third defendants filed a defence on 19 November 1993 to which the plaintiffs filed a reply on 24 November 1993. The first defendant, which did not file a defence had default judgment entered against it and was subsequently ordered to be wound up.

(2) Though pleadings were deemed to be closed on 8 December 1993, the plaintiffs never filed a summons for directions or set the action down for trial.

(3) About nine years after the commencement of the suit ie on 22 October 2002, the plaintiffs' solicitors filed an application purportedly on behalf

of the parties named as the first and second plaintiffs and PT Indofood Sukses Makmur Tbk ('Sukses Makmur') to substitute Sukses Makmur for the said first and second plaintiffs on the grounds that:

(a) Sukses Makmur had taken over the rights and liabilities of the first and second plaintiffs pursuant to a purported merger in Indonesia; and

(b) the first and second plaintiffs had been dissolved and liquidated as at 1 March 1994.

(4) The second and third defendants meanwhile filed an application on 1 November 2002 to strike out the plaintiffs' action for want of prosecution. The said application was dismissed by the learned deputy registrar on 28 May 2004.

(5) On 25 June 2004 the learned deputy registrar allowed the application for substitution. The second and third defendants filed an appeal against the said decision to the judge in chambers who on 25 April 2005 allowed the said appeal by the second and third defendants as there was insufficient evidence to show that Sukses Makmur had taken over all the rights, obligations, assets and liabilities of the first and second plaintiffs. Further, important documents in connection with that issue were not adduced in evidence by the plaintiffs and Sukses Makmur who would have had possession of the same.

(6) When the appeal was first heard before the judge on 22 March 2005, the learned judge directed that further evidence to be adduced to support the application for substitution. The solicitors for the second and third defendants had written to the court, via letter dated 22 March 2005, objecting to the further evidence being adduced at the hearing of the appeal unless they satisfied the conditions set out in O 56 r 1(3A) of the Rules of the High Court 1980. No further evidence was adduced by the first and second plaintiffs and Sukses Makmur.

(7) The first and second plaintiffs and Sukses Makmur have appealed against the said decision to the Court of Appeal and that appeal has been registered as the Court of Appeal Civil Appeal No W-02–653 of 2005.

(8) On 23 June 2005 Sukses Makmur filed an application to be joined as plaintiff in the said High Court action on substantially the same grounds as the application for substitution referred to earlier. It relied on the same evidence adduced in the application for substitution. That application which was opposed by the second and third defendants was allowed by the learned judge on 20 July 2005. It was contended by the appellants that the learned judge erred in granting the order for joinder especially when he had earlier dismissed the application for substitution

which had been made on the same grounds and on the same evidence which he had found to be insufficient. The Civil Appeal No W-02–968 of 2005 herein is in respect of the said decision. The second and third defendants contended that the basis for the application for joinder is not consistent with the admission made by Sukses Makmur that the first and second plaintiffs had been dissolved and liquidated as at 1 March 1994 in the application for substitution.

(9) On 27 June 2005 the learned judge dismissed the appeal by the second and third defendants against the decision of the deputy registrar who had on 28 May 2004 dismissed the said defendants' application to strike out the plaintiffs' action for want of prosecution. The Civil Appeal No W-02–738 of 2005 herein is in respect of the said decision. The learned judge then proceeded to schedule trial dates on 25 October 2005, 26 October 2005 and 27 October 2005.

(10) On 15 September 2005 the second and third defendants filed an application in the High Court action for an order that the proceedings therein be stayed pending the disposal of the second and third defendants' appeals. That application was heard and dismissed by the learned judge on 12 October 2005. The second and third defendants then filed the present said two notices of motion in the Court of Appeal for stay of proceedings in the High Court action.

[5] Having heard the submissions of learned counsel for the plaintiffs and the defendants and having studied the affidavits filed by the respective parties, it is our judgment that the said Civil Suit No D4–22–1149 of 1993 should without further delay go for trial before the High Court. The parties should stop finding fault and hurling allegations against one another to derail the proper conduct of the trial.

[6] As regards the allegation of prejudice caused by the delay in the commencement of the trial of the said *Civil Suit No D4–22–1149 of 1993* we noted that this suit was filed in 1993 and relate to incidents which occurred as far back as 1991. It is critical for both parties that the testimony and evidence of the witnesses be heard immediately. It is for this reason that on 27 June 2005, counsel for the plaintiffs informed the High Court of the plaintiffs' desire for a speedy trial and moved the court for early trial dates. The High Court very kindly accommodated the request and fixed trial dates on 25, 26 and 27 October 2005 without any objections from counsel for the defendants.

[7] We also noted that counsel for both parties had thereafter attended before the High Court again on 20 July 2005 at which time further directions were given by the court for witness statements to be delivered before the next

pre-trial conference for case management on 12 September 2005. Again, no objections were taken by counsel for the defendants. Further pre-trial directions for the conduct of the trial were given by the High Court on 15 September 2005, on which date counsel for the defendants had also expressly participated in the conference. For example, he did not object to the observation made by counsel for the plaintiffs for a split trial on liability and damages. Counsel for the defendants also sought time from the court to filed the amended defence and prepare the analysis of pleadings and witness statements.

[8] We find that by the subsequent pre-trial conference for case management on 12 October 2005, the plaintiffs' solicitors had already served the plaintiffs' bundle of documents on the defendants' solicitors and the plaintiffs' witness statements. Counsel for the plaintiffs had also informed the High Court of the primary issue to be determined at the trial and confirmed the number of witnesses to be called on behalf of the plaintiffs. We were also informed by learned counsel for the plaintiffs that a final pre-trial conference for case management was just completed on 19 October 2005 when the finalised analysis of pleadings prepared by the defendants was handed to the High Court. It is our considered view that the defendants are estopped from seeking an order to stay the trial by reason of their conduct and participation in pre-trial conferences for case management before this court.

[9] It is our judgment that there are no special circumstances justifying a stay of the trial in the High Court as any prejudice that may be suffered by the defendants may be compensated in costs. As it is now we find that the defendants have not shown how the defendants' appeals in Civil Appeal No W-02–738 of 2005 and Civil Appeal No W-02–968 of 2005 may be rendered nugatory if the trial of this action is proceeded with.

[10] As to the complaint and dissatisfaction of the defendants that Sukses Makmur has been added jointly as the third plaintiff in the said High Court action, we are of the view by reason of this joinder all parties are now before the court. All matters in dispute in the case may be effectually and completely determined and adjudicated before the High Court. Even assuming the defendants succeed in their appeals, the first and second plaintiffs can still prosecute the claim. All in all, we are of the view that if the trial is adjourned, the plaintiffs will suffer grave prejudice. Conversely, if the trial proceed as scheduled, the defendants will suffer no prejudice.

[11] For the reasons above stated we would dismiss the defendants' appeal in Civil Appeal No W-02–738 of 2005 and Civil Appeal No W-02–968 of 2005. We also make an order that the appeal by the plaintiff in Civil Appeal No W-02–653 of 2005 be withdrawn and dismissed. As to the costs of

proceedings of the three appeals before this court, the costs are to follow the event of the trial before the High Court. Deposits paid are to be refunded to the respective parties to the present three appeals.

Appeals dismissed with costs to follow the event at the High Court.

Reported by K Nesan